In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 523

WINN-DIXIE STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 22-31) is reported at 361 F. 2d 512. The Board's Decision and Order (R. 70-83, 28-54)[1] are reported at 147 NLRB 788.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1966 (Pet. 32-36). The petition for a

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[1] "R." and "J.A." references are to the Transcript of Record and Joint Appendix filed in the court below.

writ of certiorari was filed on September 6, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner violated its duty to bargain under the National Labor Relations Act when, because of economic considerations, it contracted out its cheese packaging work without first bargaining about that decision with the union representing the employees who formerly performed that work.

STATUTE INVOLVED

Section 8(d) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 158(d)), appears at page 3 of the petition.

STATEMENT

1. Petitioner, a multistate retail grocery chain, maintains a warehouse in Jacksonville, Florida, from which it services 95 stores comprising its Jacksonville Division (R. 29, 32; J.A. 97, 126).[2] The Union[3] represents the employees in the meat and cheese processing and packaging department at the Jacksonville warehouse (R. 30-31).

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[2] Petitioner's enterprise is divided into 8 divisions, each of which is a complete operational unit performing the functions of buying, merchandising and warehousing (R. 32; J.A. 97).

[3] Meat Cutters, Packinghouse and Allied Food Workers Union, Local 433, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

Prior to April 1963, unit employees at the warehouse prepared "random weight cheese"[4] for distribution to the various stores in the Jacksonville Division (R. 32, 34; J.A. 101). This operation entailed slicing bulk cheese (purchased from outside suppliers, primarily Kraft Food Company) into random sizes or weights, hand-wrapping it in plastic film carrying petitioner's label, sealing it with heat, weighing the package, and marking the price and weight on the package (J.A. 71-74, 93, 96, 101).

In April 1963, petitioner decided to discontinue performing its cheese processing and packaging operations with its own employees and, instead, to purchase all its random-weight cheese in prepackaged form from Kraft.[5] Accordingly, petitioner abolished the jobs of its cheese processing and packaging employees, transferring four of these employees to other jobs and permanently dismissing the remaining six (R. 33-34; J.A. 7-9, 15-25). Petitioner did not notify the Union that it was considering this step, did not consult the Union about whether to make the change, and did

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[4] This term refers to cheese pieces which are cut at random weights, and priced individually, in order to provide a wide selection for customers (J.A. 73).

[5] Petitioner ascertained, after considerable study and experimentation, that direct purchase of Kraft's prepackaged cheese would be less expensive and would increase the shelf life of the cheese, with no loss in merchandising advantages (R. 33; J.A. 106-107, 104, 101, 138). The cheese, as packaged by Kraft, bore petitioner's labels and was stamped by Kraft with the weight and price as fixed by petitioner (R. 33; J.A. 92-93, 101, 106).

not discuss with the Union the possibility of transferring the six laid-off employees (R. 33; J.A. 119, 10).[6]

2. The Board found that the petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act by effecting the changeover in its cheese processing and packaging operation without first bargaining with the Union about this decision and its effects on the unit employees (R. 71-73, 41). The Board's order (R. 75-83) directed petitioner to cease and desist from the unfair labor practice found; to bargain with the Union upon request concerning the resumption of its cheese processing and packaging operation, and, if no agreement be reached with respect thereto, to bargain with the Union concerning the effects of the changeover on the unit employees; to make the discharged employees whole for loss of pay; and to post appropriate notices.

3. The court of appeals, with one judge dissenting, affirmed the Board's unfair labor practice findings, holding that "there was a duty on the part of Winn-Dixie to consult and bargain with the Union as the employees' representative before discontinuing its cheese cutting and packaging operation" (Pet. 30). The court enforced the Board's order, except for the provision requiring petitioner to bargain with respect to the reestablishment of the cheese processing and

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[6] Although one of the employees notified the Union of the change, the Union believed it futile to ask the Company to bargain about the matter until disposition of a proceeding then pending before the court below (138 NLRB 1355, enforced 324 F. 2d 502) in which petitioner was challenging the Union's representation rights (R. 34, 39; J.A. 6-7).

packaging operation. As to that portion of the order, the court concluded that bargaining "at this late date" would be a mere "exercise in futility" (Pet. 30-31).

ARGUMENT

The decision of the Board and the court of appeals is consistent with this Court's decision in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, and it does not conflict with any other decision. There is, therefore, no occasion for further review.

1. In *Fibreboard*, the Court held that an employer violated his duty to bargain when he failed to negotiate with the union before contracting out maintenance work, previously done by unit employees, to an independent contractor who undertook to perform the same work with a different set of employees. The factors emphasized by this Court in arriving at that result (379 U.S. at 213) are present here. The contracting out of the cheese packaging work did not alter petitioner's basic operation; its retail stores still continued to sell packaged, random-weight cheese under its own label. The contracting out did not involve a substantial recoupment or commitment of capital investment; it merely replaced petitioner's employees with those of the contractor.[7] The decision to con-

[7] Petitioner asserts (Pet. 5) that an alternative choice would have been to emulate Kraft's processing and packaging operation, which may well have involved a substantial commitment of investment capital. But petitioner rejected this alternative, apparently because of its cost, and its decision

tract out was motivated by a desire to reduce operating costs, a matter long regarded as "peculiarly suitable for resolution within the collective bargaining framework" (379 U.S. at 214). Accordingly, the "type of contracting out" involved in this case is the same as that in *Fibreboard*, and the court below properly found it to be a statutory subject of bargaining.

2. There is no merit to petitioner's contention (Pet. 16-17) that the instant case is in conflict with the Eighth Circuit's decision in *National Labor Relations Board* v. *Adams Dairy, Inc.*, 350 F. 2d 108, certiorari denied, 382 U.S. 1011.[8] The contracting out in *Adams* involved a substantial recoupment of investment capital (350 F. 2d at 110, 111); the company retained relatively little control over and had slight contact with the product after it was placed in the contractor's hands (*id.* at 111); and the company in that case had done some bargaining about contracting out during the negotiations and had unsuccessfully sought the union's recommendation for reducing costs in its delivery operation immediately prior to its decision to contract

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to contract out the work rather than continue its previous method involved no commitment of investment capital.

[8] In *Adams*, the Eighth Circuit held that the company was not required to bargain about its decision to contract out its delivery operation. The court held, however that the company violated Section 8(a)(5) of the Act by not bargaining as to the "effects" on the unit employees of its decision to contract out unit work. See 350 F. 2d at 115, affirming the previous order in 322 F. 2d 553, 562. Cf. *National Labor Relations Board* v. *Royal Plating and Polishing Co., Inc.*, 350 F. 2d 191, 196 (C.A. 3).

out that operation (*id.* at 113).[9] None of these factors is present here.

3. Petitioner also errs in contending (Pet. 10-11) that this case involves a "complete closing down of an operation," rather than "contracting out," and should thus be governed by the principles of *Textile Workers* v. *Darlington Manufacturing Co.*, 380 U.S. 263. The Court in *Darlington* merely held that an employer did not violate Section 8(a)(3) of the Act by permanently closing a part of his business even if he was motivated by anti-union considerations, unless the "purpose and effect" of such action was to "chill unionism" in his other plants (380 U.S. at 275, 276). It did not decide whether, where such a partial closing of business is permissible, the employer might still be required to bargain with the union before taking such action (see 380 U.S. at 267, n. 5). Moreover, where, as in *Fibreboard* and here, an employer does not abandon an operation but merely hires a third party to perform the same operation for his benefit, such action cannot realistically be viewed as a partial "going out of business."

National Labor Relations Board v. *William J. Burns International Detective Agency*, 346 F. 2d 897 (C.A. 8), and *National Labor Relations Board* v. *Royal Plating and Polishing Co., Inc.*, 350 F. 2d 191 (C.A. 3), cited by petitioner (Pet. 15-18), are likewise distinguishable. In those cases there was substantial basis for concluding that the company had

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[9] The decision in the instant case was not preceded by any form of bargaining whatever. Petitioner had refused to recognize the Union at the time of its decision (R. 71).

completely shut down an operation rather than merely contracted it out.[10]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[10] In *Burns*, the court found that the company was not required to bargain with the union prior to terminating completely, for valid economic reasons, its services in an entire geographic area. The court distinguished *Fibreboard* on the ground that "[n]o one is performing for Burns by subcontract or otherwise the services formerly rendered by its Omaha guards" (346 F. 2d at 901). Similarly, in *Royal Plating*, the court held that the company was not required to bargain before permanently closing one of its two plants, where the closing was an economic necessity (350 F. 2d at 196).

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